No. 89-5961

In The

Supreme Court of the United States

October Term 1990

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Are the standards used by the Florida Supreme Court to approve or disapprove a death sentence imposed by a trial judge despite a jury's recommendation of life subject to Eighth Amendment review; and was the affirmance of Petitioner Parker's death sentence based upon an unconstitutional application of those standards?

II. Did the Court of Appeals below err in holding that Petitioner's constitutional claim against an evidentially unsupportable felony murder conviction was not presented to and decided by the Florida Supreme Court on direct appeal and that, even if the claim was properly preserved on appeal, it was procedurally barred by Petitioner's failure to re-raise it in state postconviction proceedings?

III. Where the jury was permitted to convict Petitioner of first degree murder on either a felony murder theory or a premeditated murder theory, did the Court of Appeals err in holding that the availability of the latter theory made it harmless error to instruct the jury to completely disregard Petitioner's defense to felony murder?

IV. Was Petitioner denied Due Process when the prosecutor was permitted to cross examine him about the fact that he had conferred with defense counsel during a recess in his testimony, although the conference had been authorized by the trial judge and although the prosecutor offered no good faith basis for asserting that it involved any conduct legitimately relevant for impeachment?

(A Fifth question presented in the petition for certiorari is now moot and will not be briefed.)

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Florida Supreme Court affirmed Robert Parker's convictions and sentences on direct appeal. *Parker v. State.* 458 So.2d 750 (Fla.1984). This Court denied certiorari. *Parker v. Florida,* 470 U.S. 1088 (1985). The Florida Supreme Court affirmed the denial of Parker's State post conviction action brought pursuant to Rule 3.850, Florida Rules of Criminal Procedure. *Parker v. State,* 491 So.2d 532 (Fla.1986). The United States District Court for the Middle District of Florida denied Parker's petition of writ of habeas corpus as to his convictions, but granted relief from the death sentence in an unreported order (J.A.91-146). The Eleventh Circuit Court of Appeals affirmed the denial of relief from convictions, but reversed the District Court's order vacating the death sentence. *Parker v. Dugger,* 876 F.2d 1470 (11th Cir.1989).

Citations to the Joint Appendix are designated J.A. ___. Citations to the transcript in the State trial court are designated as T.___. Citations to the State appellate Record on Appeal, which consists of the pleadings filed in the State trial court, are designated R.___. All parties will be referred to as they appeared in the trial court. Emphasis is supplied unless otherwise noted.

STATEMENT OF THE GROUND ON WHICH JURISDICTION IS INVOKED

The judgment and opinion of the Court of Appeals was filed on June 19, 1989, and Mr. Parker's timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied on August 17, 1989. Mr. Parker's Petition for Writ of Certiorari was filed with this Court on November 7, 1989. On June 28, 1990, this Court entered an Order

granting certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defence,

The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,

And the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law
> . . . .

This case also involves the application of Section 921.141, Florida Statutes (1981), attached after conclusion of brief.

STATEMENT OF THE CASE

A. Undisputed Facts.

On the morning of Friday, February 5, 1982, Robert Parker provided a gram of phencyclidine, a controlled substance referred to as "T," to Tommy Groover (T.1817). Groover was to sell the T at a profit and then pay the Defendant after the sale, keeping the profit for himself (T.1813-4). Groover, Richard Padgett and another acquaintance then used the T (T.1128-9, 1140). This made Parker upset with Groover, because he was concerned

that Groover would not be able to pay him back for the T (T.1817). Padgett told Groover that he would give him some T of his own later that evening (T.1141). The next day, the Defendant went to the residence of Billy Long, where Groover was living (T.1182, 1334-5). Groover and Long were going out to try to collect money that was owed to them for drugs that Groover and Long had sold (T.1361). Groover was armed with a shotgun (T.1212). Long and Groover went looking for Padgett (T.1361-78, 1686-7). Groover and Long met up with Padgett and his girlfriend, Nancy Sheppard, at a bar that evening (T.1245-6). They all proceeded to the mobile home where Robert and Elaine Parker (Robert's ex-wife) were living, picked up the Parkers, and returned to the Sugar Shack (T.1387-92). Long took Nancy Sheppard home and dropped her off (T.1249-52).

Later that night, a witness observed Groover beating up Padgett at a junkyard owned by Parker's parents (T.1457-8, 1468-9). The Defendant went to the witness' door and asked for a wash cloth to care for Padgett, who was bleeding (T.1469-70). Groover was heard to be arguing with Padgett, and was seen with a gun in his hand as he left the witness' premises (T.1470-3). Parker was unarmed (T.1471-2). Padgett was killed soon thereafter. Shortly after midnight, another witness observed Groover and Parker melting down a gun at the junkyard (T.1482-4). This witness noticed that Groover had something stuck in his pants off to one side, covered by his shirt (T.1497-8).

Groover asked Elaine and Robert Parker to take him to another bar, where Groover met a girlfriend, Jody Dalton (T.1851-2, 1341-2). Dalton accompanied Groover and the Parkers to the Parkers' trailer; Dalton was dropped off and Groover and the Parkers proceeded to

pick up another friend, Joan Bennett (T.1853-6). They all returned to the Parkers' trailer, and then went to an area called Donut Lake (T.1512-3). Once at the lake, Groover kicked and beat Dalton, then pulled a gun from his boot and shot her (T.1518-19). The Defendant shouted "What are you doing you crazy m——f——?" (T.1559). Dalton's body was then tied to concrete blocks and sunk in the lake (T.956-985). As they left the lake, Groover told Bennett that he would kill her if she said anything, and that he would have somebody kill her even if he was in jail (T.1563-4). Bennett was dropped off at her trailer (T.1564-5).

Groover and the Parkers then went to Billy Long's house and picked up Long (T.1252-5). While Groover drove Elaine's car, Long told Groover how to get to Sheppard's house (T.1253, 1402). Elaine went to Sheppard's door and got Sheppard to accompany them in the car (T.1869). Sheppard was taken to a wooded area, where she saw Padgett's body in a ditch (T.1260). Long then shot her (T.1410). Long threw her body into the ditch next to Padgett (T.1427-9).

The next day, Monday, a conversation between Groover and the Defendant was overheard by a State witness. Groover stated that he (Groover) had cut Padgett's throat after Padgett was shot (T.1494). Groover was heard to say that he (Groover) had "made Billy Long shoot the girl." (T.1494) Robert Parker was heard telling Groover that he (Parker) did not know Padgett was going to be killed, and that he thought that Padgett was going to be left in the woods to walk home (T.1494).

Medical evidence showed that Padgett had been killed by a gun shot wound to the back of the head, and that he had also received two potentially fatal stab wounds to the chest and non-fatal slash wounds across

his neck (T.1019-21). Dalton died of four gun shot wounds to the head (T.1058-66). Sheppard died from five gunshot wounds, two to the back of the head, one over the eye, and two in the chest (T.1025-31). Sheppard also received seven non-fatal, superficial stab wounds to the neck (T.1029, 1032, 1049).

B. State's Theory.

The State's case was based primarily upon the testimony of Billy Long and Joan Bennett. Long testified that Parker had threatened Padgett with a gun at Parker's mobile home (T.1391). Long said that Groover and Parker tricked him into going with them to Sheppard's house on the morning of her death by telling him that Padgett wanted to see Sheppard (T.1252-3, 1397-8). Long further claimed that the Defendant showed him the body of Padgett in the ditch and then ordered Long to kill Sheppard, or to "lay in the ditch with them." (T.1257-1404). Long said that Elaine then handed him a pistol and that he proceeded to shoot Sheppard (T.1260-1, 1410). Long said that the Defendant obtained a knife from Groover and cut Sheppard's throat (T.1261, 1410-1). Long stated that the Defendant took Sheppard's necklace and class ring before Long threw her body into the ditch (T.1261, 1427-9). Long said that he was afraid of Robert Parker because the Defendant had shot him during an argument two years earlier (T.1257-9, 1336-8).

Joan Bennett testified that, on the way to Donut Lake, Groover told Parker that he was going to "waste" Jody Dalton because "she had seen the piece that we used on Richard." (T.1514). Bennett alleged that the Defendant agreed with Groover (T.1551). Though Bennett confirmed that the Defendant shouted, "What are you doing?" at Groover at the time Groover shot Dalton, she added that

the Defendant was only concerned about the noise (T.1519, 1559).

In summation, the State argued that Padgett was not killed for money, but that he was killed because the Defendant and Groover were afraid of Padgett's family, and had to silence Padgett (T.2130-1). The State argued that the Dalton and Sheppard murders were perpetrated to cover up the Padgett murder (T.2261).

C. Defense Version.

Robert Parker testified that, though Groover did owe him money for the gram of T, Groover had given him a gold cross and necklace as collateral until he could pay him back, so the Defendant was not concerned about getting his money (T.1826). The Defendant denied threatening Padgett or being angry with Padgett at all, because Groover, not Padgett, owed him money (T.1832-3). Because Groover and Padgett were arguing and beginning to fight in the car, the Parkers took them to Parker's parents' junkyard to let them fight (T.1838-40). Parker broke up the fight when Groover hit Padgett with brass knuckles (T.1840-1). The Defendant obtained assistance for Padgett, who was bleeding from the fight (T.1841-2). The Defendant testified that Groover told them that they should take Padgett out into the woods, drop him off, and let him walk home, because they would risk attack from Padgett's brothers and cousins if they took Padgett home in a beaten condition (T.1843-4). Elaine followed Groover's instructions and drove them into an isolated, wooded area (T.1844). Robert and Elaine remained in the car and Groover and Padgett got out (T.1844). They heard a gun shot, and Robert jumped out of the car (T.1845). Parker then saw Padgett laying on the ground, and Groover attempting to shoot Padgett again, then stabbing

him with his knife (T.1845-6). After killing Padgett, Groover told the Parkers to keep quiet about the murder or he would "get them" or "get their children" (T.1847-9). Parker melted down the murder weapon at his parents' junkyard, after observing that Groover had another pistol in his pants (T.1849-50).

The Defendant testified that he was unaware of any intention on Groover's part to kill Jody Dalton until, while at Donut Lake, Groover knocked her down, kicked her, pulled the pistol out of his boot and shot her (T.1860-1). Parker agreed that he shouted at Groover, but denied that he was concerned about the noise (T.1861-2). Parker said he was afraid of Groover, after having seen him kill two people, and that when Groover told him to tie concrete blocks to the body and take it into the lake, he did so (T.1863-4).

The Defendant testified that he and Elaine were hoping that Groover would leave them when he found Billy Long, but instead, Long joined them in the car (T.1866-7). The Defendant believed that Long was aware of Groover's plan when he got into the car (T.1868). Elaine went and got Nancy Sheppard to come out to the car upon Groover's orders (T.1869). Once at the wooded area where Padgett had been killed, the Defendant testified that he got out of the car only to let others get out behind him (T.1870). When Sheppard walked over to the ditch, she fell to her knees and Long walked over and shot her (T.1870). Parker remained standing at the car (T.1870). Parker heard Groover tell Long to cut Sheppard's throat, then turned and got back in the car because he did not want to watch (T.1871).

The credibility of Bennett and Long was vigorously attacked. It was shown that Bennett was allowed to plead guilty to accessory after the fact to first degree murder in

exchange for her testimony for the State. Upon her agreement to testify for the State, she had been released from jail (T.1582-3). Long, who had been facing a charge of first degree murder and unrelated charges of sale and possession of methaqualone and sale and possession of cocaine, was permitted to plead guilty to second degree murder, and the remaining charges were dismissed (T.1436-40). Though Long said that he killed Sheppard because he was afraid of Parker, he admitted that he did not see Parker with a gun at all that morning, and that the Defendant at no point said that he was armed (T.1418-20). Long was 6'2" tall, weighed 240 pounds, and had been employed as a bouncer at a local topless bar (T.1334, 1338). The Defendant was 5'10" and weighed approximately 190 pounds (R.1). Long had sworn to police that Parker had forced him to shoot Sheppard by pointing a gun at him, but at trial, Long admitted that this was not true (T.95-7, 1414-7, 1417-21, 1424, 1432).

The defense also presented the testimony of several other jail inmates concerning statements made by Billy Long. One inmate heard Long talking to Groover and advising him "if you don't want to get the electric chair, you better do like I did and say Robert made you do it" (T.1749). Another jail inmate overheard Long boasting that he would lie to see to it that Robert Parker got the death penalty (T.1765). Long confided to this inmate that he, not Parker, had cut Sheppard's throat (T.1765). Long told this inmate that the Defendant was at the car at the time Sheppard was killed, and that only Long and Groover were outside the car with Sheppard (T.1766). Parker's version of the Sheppard homicide was further corroborated by statements Groover had made to this same inmate, that Parker was back at the car when Sheppard was murdered, and had had no active involvement

in her death (T.1788). A third jail inmate also testified that Long had told him that Long, not the Defendant, had cut Sheppard's throat (T.1799-1800).

D. Trial Court's Submission of Guilt Issue to Jury.

The Indictment charged the Defendant with first degree murder in the death of Richard Padgett in Count One, first degree murder in the death of Nancy Sheppard in Count Two, and first degree murder in the death of Jody Dalton in Count Three (R.133-4). At the charge conference, the State requested that the jury be instructed on first degree felony murder as to both Count One and Count Two, arguing that the applicable felony in Count One was kidnapping and, in Count Two, robbery (J.A.3-5). The Defendant objected to the felony murder instruction on the ground that it was not supported by the evidence, but his objection was overruled (J.A.3-5).

The defense submitted an instruction concerning the common law defense of duress or coercion, as follows:

> One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the coercion or duress must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. (Citation omitted.) It is assumed that every person's actions are free from duress, absent evidence to the contrary. However, once some evidence of duress has been brought before the jury, the burden is upon the state to prove beyond a reasonable doubt that the defendant did not act under duress. (Citations omitted.) (R.360).

The State submitted this contrasting requested instruction:

> Coercion or duress is not available as a defense in a case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or an attempted murder of an innocent third party. (Citation omitted.) (R.320).

The Defendant's requested instruction was denied (J.A.12-5). The defense objected to the State's requested instruction, and requested a modification of the instruction to the effect that duress could be a defense to felony murder where the accused was not the actual killer (J.A.16-9). The trial court ruled that the State's "duress is not a defense to homicide" instruction would be given without limiting its applicability to premeditated murder (J.A.22-5). The jury returned general verdicts finding the Defendant guilty of first degree murder in Count One, first degree murder in Count Two, and third degree murder in Count Three (J.A.30-2).

E. Penalty Phase.

The evidence presented by the State in aggravation consisted of a judgment showing the Defendant had been convicted of aggravated battery in the shooting of Billy Long in 1980 (T.2314-7). The defense presented testimony from a number of the Defendant's relatives and friends (T.2318-2365). This evidence showed the Defendant being raised by an alcoholic, wife beating father, and being influenced by Elaine, an older woman, to leave school after the ninth grade and to use illegal drugs. Despite these problems, the evidence showed the Defendant to be a good father to his two young children, ages nine and eleven, and that he had unselfishly assisted relatives and neighbors in times of personal crisis and need.

The defense also presented the written negotiated plea agreement of Elaine Parker, in which the State had dropped two first degree murder charges and reduced the murder of Nancy Sheppard from first degree to second degree, in exchange for a guilty plea and her promise to testify for the State (T.2366). Despite this agreement, the State did not call Elaine Parker as a witness, because she could not rebut the Defendant's testimony (T.2053-4, 2056-8).

The defense also introduced documents showing that Tommy Groover had been convicted of three counts of first degree murder, and that the trial court had sentenced Groover to death for the murders of Padgett and Dalton, and to life imprisonment for the Sheppard murder (T.2377-8).

The State presented no rebuttal evidence.

The jury was given a specific verdict form, and found that sufficient mitigating circumstances existed that outweighed any aggravating circumstances and therefore recommended a sentence of life imprisonment as to both the Padgett and Sheppard murders (J.A.33-5).

At the final sentencing hearing before the court, the State, over objection, presented the testimony of relatives of Richard Padgett and Nancy Sheppard, in which they described the decedents in sympathetic terms and asked the court to impose the death penalty (T.2533-51). The defense presented no additional evidence and, after hearing argument, the court imposed a life sentence for the Padgett homicide, a death sentence for the Sheppard homicide, and a term of fifteen years imprisonment for the Dalton homicide (J.A.36-63). The sentencing order is replete with factual errors, including a description of the Padgett homicide that is without any evidentiary basis

whatsoever, and a description of the Dalton homicide that requires the acceptance of Joan Bennett's testimony, despite its clear rejection by the jury. The court found six aggravating circumstances and no mitigating circumstances for either the Sheppard or Padgett homicides, then imposed the death sentence for the Sheppard murder. Nowhere in the sentencing order did the trial judge address non-statutory mitigating circumstances (J.A.36-63).

SUMMARY OF ARGUMENT

Argument I

Both the U. S. District Court and the Eleventh Circuit Court of Appeals found that the application of the *Tedder* jury override standard is subject to some form of review under the Eighth Amendment. In *Lewis v. Jeffers*, 110 S.Ct.3092 (1990), this Court described a three step analysis to determine the constitutionality of state law rules which are used to support a death sentence. Applying this three step analysis to the *Tedder* standard, it appears that the *Tedder* standard is unconstitutional on its face, but constitutional as construed by the Florida Supreme Court. However, because the Florida Supreme Court did not apply the constitutional construction of *Tedder* in this case, the death sentence must be vacated and remanded to the Florida Supreme Court for reconsideration.

Argument II

At trial, the Defendant objected to a jury instruction on felony (robbery) murder on grounds that the evidence was insufficient to sustain the instruction, but the instruction was given and the jury returned a general verdict of

guilty. On appeal, the Florida Supreme Court found that the evidence was insufficient to prove the existence of the felony of robbery as an aggravating circumstance. On rehearing, the Petitioner pointed out that he could well have been convicted on a felony murder theory that was not supported by the evidence. The State objected to rehearing on grounds that the defense was re-arguing issues that had already been decided. Rehearing was denied without opinion. It is Petitioner's contention that his conviction in Count Two must be set aside because it could rest on the invalid felony murder theory. The Eleventh Circuit found procedural default because the Petitioner had not raised the issue on direct appeal, but also found that, even if Petitioner did raise it, the claim was defaulted because it was not raised in state court collateral proceedings as well. Petitioner submits that he raised the sufficiency of the evidence issue in both the trial and appellate court levels in state court, and thus it was unnecessary to raise it a second time in state collateral proceedings. On the merits, Petitioner should receive a new trial under *Stromberg v. California*, 283 U.S. 359 (1931).

Argument III

The Petitioner asserted a duress defense as to Count Two. His request for a general duress instruction was denied. The State requested an instruction that duress was not a defense to murder, which was granted. The Petitioner requested a modification of the State's instruction, allowing duress to be considered as a defense to felony murder, but this was denied. The Eleventh Circuit found that the Petitioner's requested instruction was misleading because it implied that duress could be a defense

to premeditated murder as well as felony murder, and therefore held that the denial of the instruction did not violate due process. The court completely overlooked the fact that the State's requested instruction was equally misleading, yet was in fact given to the jury. The giving of this instruction permitted the State to argue that the Petitioner should be convicted even if his own testimony was believed. It had the effect of a directed verdict of guilty, and cannot be squared with Fourteenth Amendment due process.

Argument IV

While the Petitioner was on cross examination, the court declared a recess and permitted him to consult with his attorney, consistent with this Court's holdings in *Geders v. U.S.*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 109 S.Ct. 594 (1989). When the trial resumed, without any sort of proffer, the prosecutor accused the Petitioner of being "well coached," then brought out the fact of consultation during the recess as if to confirm that in fact the Petitioner had been engaging in improper coaching with his attorney. No questions were asked concerning the actual nature of the communications. It is constitutionally impermissible for a state to tell an accused that he has the right to act in a certain fashion, then to attack him because he exercised that right. The truth-seeking function of impeachment is not served by allowing cross examination on constitutionally protected attorney-client communications in the absence of any grounds for a good faith belief that coaching has occurred. The action of the prosecutor here violated the Petitioner's rights under the Sixth and Fourteenth Amendments.

ARGUMENT I

THE STANDARDS USED BY THE FLORIDA SUPREME COURT TO APPROVE OR DISAPPROVE A DEATH SENTENCE IMPOSED BY A TRIAL JUDGE DESPITE A JURY'S RECOMMENDATION OF LIFE ARE SUBJECT TO EIGHTH AMENDMENT REVIEW; AND THE AFFIRMANCE OF PETITIONER'S DEATH SENTENCE WAS BASED UPON AN UNCONSTITUTIONAL APPLICATION OF THOSE STANDARDS.

In *Proffitt v. Florida*, 428 U.S. 242 (1976), this Court upheld the facial constitutionality of Florida's death penalty sentencing procedure. In finding that Florida Statute 921.141 was constitutional, the court noted that:

> The Florida capital sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and re-weighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." *Songer v. State*, 322 So.2d 481, 484 (1975). See also, *Sullivan v. State*, 303 So.2d 632, 637 (1974). *Proffitt v. Florida, id.*, at 254.

This Court also noted the additional function of the Florida Supreme Court to review the decisions of trial judges " . . . to ensure that they are consistent with other sentences imposed in similar circumstances." *Id.* In upholding Florida's capital sentencing scheme, therefore, this Court understood that the Florida Supreme Court reweighed the aggravating and mitigating circumstances in reviewing a death sentence, and also conducted a proportionality review to eliminate the previous constitutional

infirmity that there was "no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 188, (1976), quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring), *Proffitt, id.*

In *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court had occasion to consider another death sentence imposed by Judge Olliff despite a life recommendation from the jury. This Court recognized the safeguard provided by the Florida Supreme Court's standard used to review a trial court's jury override:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975).

This Court described the *Tedder* standard as a "crucial protection" requiring "exacting standards." *Dobbert v. Florida, id.*, at 296-7.

This Court considered another of Judge Olliff's jury override sentences in *Barclay v. Florida*, 463 U.S. 939 (1983). In *Barclay*, Judge Olliff had found an improper aggravating circumstance in sentencing Barclay to death. This Court noted the evolving body of Florida case law:

> One question that had arisen is whether defendant must be re-sentenced when trial courts erroneously consider improper aggravating factors. If the trial court found that some mitigating circumstances exist, the case will generally be remanded for re-sentencing. *Elledge v. State*, 346 So.2d 998, 1002-1003 (Fla.1977). See, e.g., *Moody v. State*, 418 So.2d 989, 995 (Fla.1982); *Riley v. State*, 366 So.2d 19, 22 (Fla.1979). If the trial court properly found that there are no mitigating circumstances, the Florida Supreme Court applies a harmless error analysis. *Elledge, supra*, at 1002-1003. See, e.g., *White v. State*, 403 So.2d 331 (Fla.1981); *Sireci v. State*, 399 So.2d 964, 971 (Fla.1981). *Barclay v. Florida, id.*, at 954-5.

The Court then recognized the *Tedder* standard as "another check on the harmless error analysis permitted by *Elledge.*" *Id.*, at 955-6. The Court noted that the "touchstone" in determining whether the consideration of improper aggravating factors was reversible error was the presence or absence of mitigating circumstances. *Barclay, id.*, at 966, n.12. If there are improperly considered aggravating circumstances, and any mitigating circumstances, the error is not harmless. Significantly this Court noted that "nonstatutory mitigating circumstances did not play any role" in the *Elledge* harmless error analysis. *Barclay v. Florida, id.*, at 967, n.13. *Barclay*, of course, was decided well before this Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), where this Court held that the Eighth Amendment requires both Florida judges and juries to consider evidence of non-statutory mitigating circumstances.

Finally, this Court most recently considered a Florida jury override in *Spaziano v. Florida*, 468 U.S.447 (1984). The Court ruled that Florida's sentencing scheme, permitting a judge to overrule a jury life recommendation, does not violate the Eighth Amendment, in part because of the "significant safeguard" accorded capital defendants by the *Tedder* standard, and in part because meaningful appellate review by the Florida Supreme Court had reduced the likelihood that the death penalty would be imposed in an arbitrary or discriminatory manner. *Id.*, at 465-6. This Court found no indication that the application of the jury override procedure had resulted in the unconstitutional application of the death penalty, in general, or in the case before it. *Id.*, at 466.

The capital sentencing process in Florida, as approved by this Court, thus involves three players: the jury, the judge, and the Florida Supreme Court. *Alvord v. State*, 322 So.2d 533, 542 n.10 (Fla.1975) (England, J., concurring and dissenting). The Florida Supreme Court has made frequent reference to "our trifurcated death penalty statute." See, *Ross v. State*, 384 So.2d 1269, 1275 (Fla.1980); *Dobbert v. State*, 375 So.2d 1069, 1071 (Fla.1979); *Schue v. State*, 366 So.2d 387, 390 (Fla.1978); *Buckrem v. State*, 355 So.2d 111, 113 (Fla.1978); *Burch v. State*, 343 So.2d 831, 834 (Fla.1977); *Provence v. State*, 337 So.2d 783, 787 (Fla.1976); *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). This Court has referred to the Florida Supreme Court as occupying the final tier of the capital sentencing process "in what may be termed a tripartite review." *Dobbert v. Florida. id.*, at 296. Thus, the *Tedder* standard is used by the Florida Supreme Court to make the determination as to whether life or death is the appropriate sentence.

The Florida Supreme Court has noted that a jury life recommendation eliminates any presumption that death is the appropriate penalty, even though one or more aggravating circumstances may be present. *Williams v. State*, 386 So.2d 538 (Fla.1980). The obligation of the Florida Supreme Court in applying Tedder is to scrutinize the trial record for any mitigating circumstances that could form a "reasonable basis" for the jury's recommendation, as described in *Malloy v. State*, 382 So.2d 1190 (Fla.1979):

> Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, in doing so, we must determine if there was a reasonable basis for the jury's recommendation. *Id.*, at 1193.

By the time of Robert Parker's appeal, the Florida Supreme Court had said that "it is well settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." (Citations omitted.) *Richardson v. State*, 437 So.2d 1091, 1095 (Fla.1983). This "reasonable basis" test requires the Florida Supreme Court to examine the record for mitigating circumstances that could have influenced the jury to return a life recommendation even where the trial court judge found that no mitigating circumstances existed in his sentencing order. *Malloy, id.; Richardson, id.; Hawkins v. State*, 436 So.2d 44 (Fla.1983); *Welty v. State*, 402 So.2d 1159 (Fla.1981); *Neary v. State*, 384 So.2d 881 (Fla.1980). It is against this framework of Florida law, well established at the time of Mr. Parker's appeal, that the evidence and arguments made at Mr. Parker's trial must be viewed.

It is Mr. Parker's contention that at least one, if not two, rules of appellate review in Florida have been applied unconstitutionally in this case: the *Tedder* jury override rule, and the *Elledge* harmless error rule. This Court has repeatedly recognized the general principle that rules and standards governing the imposition of capital sentences must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not. *Lewis v. Jeffers*, 110 S.Ct. 3092, 3099 (1990). Because the *Tedder* rule is a standard by which the Florida Supreme Court decides whether a sentence of life or death is appropriate, the *Tedder* standard must be applied " . . . in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." See, *Lewis v. Jeffers, id.*, quoting

Spaziano v. Florida, 468 U.S. at 460 (1984). Likewise, the *Elledge* rule is a standard by which the Florida Supreme Court determines whether to affirm a death sentence or to remand for resentencing.

In *Lewis v. Jeffers*, this Court described three ways in which a standard governing the imposition of a capital sentence can be found to be constitutionally deficient:

> 1. Where the standard is vague on its face and has not been construed by the state courts in a manner sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988).
> 2. Where the state courts have adopted a constitutional narrowing construction of the standard, but where the state courts fail to apply the narrowing construction to the facts of the individual case. *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980).
> 3. Where a state has adopted a constitutionally narrow construction of a standard governing the imposition of a death sentence, and has applied that construction to the facts of the particular case, its application is unconstitutional only if no rational trier of fact could have found the standard applicable based upon the evidence in the record. *Lewis v. Jeffers*, *id.*, at 3102-4.

If the *Tedder* standard is analyzed in these terms, it would be unconstitutionally broad and vague on its face. The *Tedder* standard is simply that "the facts suggesting the sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder*. *id.*, at 910. The standard does nothing to inform sentencers what they must find to impose the death penalty and, as a result, "leaves them and the appellate courts with the kind of open ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972)." *Maynard*, *id.*, at 362. The *Tedder* standard, on its face and

without judicial construction, performs no channeling or limiting of the sentencer's discretion in imposing the death penalty, and therefore fails to minimize the risk of wholly arbitrary and capricious action. See, *Maynard*, *id.* Additionally, it makes no allowance for the consideration of mitigating circumstances, and so runs afoul of this Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

It appears, however, that this Court upheld the constitutionality of the *Tedder* standard by reference to its construction by the Florida Supreme Court. See, *Spaziano v. Florida*, 468 U.S. at 465, citing *Richardson v. State*, 437 So.2d 1091, 1095 (Fla.1983), with approval. As noted, the *Richardson* construction of the *Tedder* standard requires the appellate court to examine the record for mitigating circumstances to determine if there is any "reasonable basis" for the life recommendation. The reasonable basis construction of *Tedder* was established well before Mr. Parker's trial, see *Malloy v. State*, 382 So.2d 1190 (Fla.1979), and is now firmly entrenched in Florida law. See, *Spivey v. State*, 529 So.2d 1088, 1095 (Fla.1988); *Fead v. State*, 512 So.2d 176, 178 (Fla.1987); *Ferry v. State*, 507 So.2d 1373, 1376 (Fla.1987). This construction would appear to get the *Tedder* standard past the *Maynard v. Cartwright* test for facial invalidity. However, the application of the *Tedder* standard to Robert Parker's case does not meet the *Godfrey v. Georgia* test described above, because the state supreme court did not apply the *Richardson* construction to the facts of this case. The Florida Supreme Court's entire discussion concerning the jury override is as follows:

> The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In

> light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate. *Spaziano v. Florida*, 468 U.S. 447 (1984). *Parker v. State*, 458 So.2d 750, 754-5 (1984).

The plain language of the decision makes it clear that the Florida Supreme Court limited itself to an examination of the trial court's sentencing order in determining whether the jury override was proper. This, of course, is not consistent with the *Malloy/Richardson* construction of the *Tedder* standard, which requires the court to examine the record for mitigating circumstances that could have influenced the jury to return a life recommendation, even where the trial judge found no mitigating circumstances in his sentencing order. As in *Godfrey*, there is "no evidence" that the state court applied the narrowing construction of *Tedder* to the facts of this case. See, *Lewis v. Jeffers, id.*, at 3099. There is no evidence indicating that the Florida Supreme Court looked beyond the trial court's sentencing order to determine the "facts suggesting the sentence of death." The only mention of mitigating circumstances is the statement that the trial judge found none. There is no reference to any examination of the record to determine if there is any "reasonable basis" for the life recommendation.

At the advisory sentencing proceeding, Mr. Parker argued the existence of both statutory and non-statutory mitigating circumstances that were supported by the evidence at the guilt and penalty phases of the trial. Virtually all of these mitigating circumstances had been held to be a reasonable basis for a jury life recommendation by

the Florida Supreme Court in previous decisions. Such mitigating circumstances included:

1. *The statutory mitigating circumstance that the defendant acted under extreme duress or under the substantial domination of another person, as described in Section 921.141(6)(e), Florida Statutes.* The basis for this mitigating circumstance was the Defendant's testimony of the threats by Tommy Groover (T.1847-8, 1851, 1852, 1863, 1865, 1880-1) and the testimony by two state witnesses that the Defendant had been acting frightened (T.1697, 1562-3). The circumstance was argued to the jury (T.2483-4). The Florida Supreme Court had previously held that a jury override should not be sustained where there was evidence supporting a finding of this mitigating circumstance, because this mitigating circumstance forms a reasonable basis for the jury's life recommendation. See, *Goodwin v. State*, 405 So.2d 170 (Fla.1981); *Hawkins v. State*, 436 So.2d 44 (Fla.1983).

2. *The statutory mitigating circumstances that the Defendant was under the influence of extreme mental or emotional disturbance, or that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired, as described in Sections 921.141(6)(b), and (f). Florida Statutes.* The basis for these mitigating circumstances was the Defendant's intoxication on drugs and alcohol (T.2481-3). Evidentiary support for these mitigating circumstances was found in the testimony of the Defendant himself (T.1834, 1837, 1880-1), the testimony of five state witnesses, including Joan Bennett and Billy Long (T.1619, 1497, 1632, 1540-1, 1401-2), and two additional defense witnesses (T.1738-9, 1766). Such intoxication had previously been held to be a statutory mitigating circumstance, *Kampff v. State*, 371

So.2d 1007 (Fla.1979), and a non-statutory mitigating circumstance, *Buckrem v. State*, 355 So.2d 111 (Fla. 1978). The Florida Supreme Court had previously held that drug and alcohol intoxication constituted a reasonable basis for a jury life recommendation requiring death sentences be set aside in *Buckrem, id.*, *Cannady v. State*, 427 So.2d 723 (Fla.1983), and *Norris v. State*, 429 So.2d 688 (Fla.1983). The Florida Supreme Court has likewise recognized drug or alcohol intoxication as a reasonable basis for a jury life recommendation after its decision in Mr. Parker's case. See, *Amazon v. State*, 487 So.2d 8 (Fla.1986); *Fead v. State*, 512 So.2d 176 (Fla.1987); *Masterson v. State*, 516 So.2d 256 (Fla.1987); *Holsworth v. State*, 522 So.2d 348 (Fla.1988); *Pentecost v. State*, 545 So.2d 861 (Fla.1989).

3. *The statutory mitigating circumstance that the Defendant was an accomplice in the capital felony and his participation was relatively minor, as described in Section 921.141(6)(d), Florida Statutes.* This mitigating circumstance was argued to the jury (T.2484-7), on the grounds that Billy Long was lying to protect himself and Tommy Groover, his roommate and best friend; that it was Groover who advised Long to kill Nancy Sheppard; and that Long both shot her and cut her throat while Parker was at the car with his wife. The argument was supported by the testimony of the Defendant himself (T.1870-1), three defense witnesses (T.1749, 1765-6, 1788, 1799-1800), and at least one State witness (T.1494). In cases where a defendant was not the actual perpetrator of the homicide and where there was dispute as to the extent of his participation in the offense, the Florida Supreme Court had previously found a mitigating circumstance that would require a jury's life recommendation to be followed. See, *Taylor v. State*, 294 So.2d 648 (Fla.1974); *Slater v. State*, 316 So.2d 539 (Fla.1975); *McCaskill v. State*, 344

So.2d 1276 (Fla.1977); *Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Goodwin v. State*, 405 So.2d 170 (Fla.1981); *Hawkins v. State*, 436 So.2d 44 (Fla.1983).

4. *The non-statutory mitigating circumstance that the jury could have believed Parker's testimony as to his lesser culpability and still found him guilty.* The evidence was uncontradicted that Parker was not the actual perpetrator of any of the three homicides. The State went so far as to argue that the Defendant should be convicted even if the jury believed his testimony (T.2147-9, 2264). The contention that Parker's testimony should be accepted over that of Long was argued to the jury a second time in the advisory sentencing trial as mitigation (T.2468-74). Previously, the Florida Supreme Court, in reversing two override death sentences for two execution style murders, stated:

> We find that the jury's action was reasonable because of the conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the state. From the evidence presented, the jury could have believed the appellant's story that he was not the triggerman and still have convicted him of first degree murder. *Malloy, id.*, at 1193.

Similar reasoning resulted in the reversal of jury override death sentences in *Gilvin v. State*, 418 So.2d 996 (Fla.1982), before the decision in this case, and in *Holsworth v. State*, 522 So.2d 348 (Fla.1988), afterwards. [This factor can be a non-statutory mitigating circumstance even when the defendant's conduct is not so minor as to qualify under Section 921.141(6)(d), Florida Statutes. See *Spivey v. State*, 529 So.2d 1088 (Fla.1988).]

5. *Non-statutory mitigating circumstances concerning Mr. Parker's character and background.* The Eleventh Circuit described the evidence presented in support of non-statutory mitigating circumstances relating to the Defendant's

character and background as "copious." *Parker v. Dugger*, 876 F.2d at 1475, n.7. This evidence included the following: Robert Parker's father was an alcoholic who beat his mother in Robert's presence (T.2322-3). His father began giving Robert alcoholic beverages and taking him to bars at an early age (T.2323-4). Robert began dating Elaine, his co-defendant, when he was only 14 years old and Elaine was 16 years old (T.2325). When Elaine became pregnant, he married her at age 16 (T.2326-7). Elaine supported Robert and their baby with money from her job; he left school in the tenth grade to take care of his baby son and, later, his baby daughter (T.2327-30). Elaine introduced Robert to the use of illegal drugs (T.2357-8). The Defendant developed a drug and alcohol problem, and sought professional help, but Elaine was not supportive and he could not shake the problem (T.2330). Elaine was the dominant figure in the relationship (T.2333, 2361). The Defendant and Elaine had been married twice and divorced twice, and, at one point, he had become so distraught over Elaine leaving him that he had attempted suicide (T.2332). The Defendant had a son age 11 at the time of the trial, and a daughter age 9 at the time of the trial. He had always been a good father to his children, and had maintained a very close relationship with them (T.2338-9, 2342-4, 2346, 2351-2, 2361). The Defendant had often gone out of his way to help relatives and neighbors, including taking a neighbor's husband to a hospital three or four times a month for over a year for cancer therapy, as a favor and without reimbursement (T.2346-8), comforting a cousin through a crisis involving her baby (T.2352-4), and providing financial and emotional support for a sister when she was in marital distress (T.2359-60). This evidence was both presented and argued to the jury as mitigation (T.2388-91). The Florida Supreme Court had

previously held that such character evidence forms a reasonable basis for a life recommendation, prohibiting a jury override. See, *Neary v. State*, 384 So.2d 881 (Fla.1980); *Jacobs v. State*, 396 So.2d 713 (Fla.1981); *McCampbell v. State*, 421 So.2d 1072 (Fla.1982); *Washington v. State*, 432 So.2d 44 (Fla.1983).

6. *The non-statutory mitigating circumstance that equally culpable co-defendants had received more lenient treatment for their involvement in the Sheppard murder.* The defense introduced evidence of the disposition of the co-defendants' cases and argued it as mitigation in the advisory sentencing trial (T.2366, 2378, 2491-6). Tommy Groover, the perpetrator of the Padgett and Dalton murders, was sentenced to death for those crimes, but to life imprisonment for the murder of Nancy Sheppard. Elaine Parker, who owned both the car and murder weapon, drove the car throughout the evening, lured Nancy Sheppard out of her home, and (according to Billy Long) gave Long the murder weapon, was permitted to plead guilty to one count of second degree murder in the Sheppard homicide, and charges as to the other two murders were dropped against her. Long, who admitted murdering Nancy Sheppard by shooting her five times in the head and chest, was permitted to plead guilty to one count of second degree murder, and drug charges in two other felony cases were dropped against him. The Florida Supreme Court noted how it had applied this mitigating circumstance in numerous other cases prior to its decision in Robert Parker's case:

> This Court has upheld the reasonableness of jury recommendations of life which could have been based, to some degree, on the treatment accorded one equally culpable of the murder. *McCampbell v. State*, 421 So.2d 1072 (Fla.1982). In

such cases we have reversed the judge's decision to override the recommendation when the accomplice was a principal in the first degree; *Herzog v. State*, 439 So.2d 1372 (Fla.1983); *McCampbell v. State*; when the accomplice was the actual triggerman; *Barfield v. State*, 402 So.2d 377 (Fla.1981); *Slater v. State*, 316 So.2d 539 (Fla.1975); when the evidence was equivocal as to whether defendant or the accomplice committed the actual murder; *Smith v. State*, 403 So.2d 933 (Fla.1981); *Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Halliwell v. State*, 323 So.2d 557 (Fla.1975); or when the accomplice was the controlling force instigating the murder; *Stokes v. State*, 403 So.2d 377 (Fla.1981); *Neary v. State*, 384 So.2d 881 (Fla.1980). *Futzy v. State*, 458 So.2d 755, 759 (Fla.1984).

The Florida Supreme Court has found this mitigating circumstance as a basis for disallowing jury override death sentences in numerous cases after Robert Parker's appeal as well. See, *Brookings v. State*, 495 So.2d 135 (Fla.1986); *DuBoise v. State*, 520 So.2d 260 (Fla.1988); *Caillier v. State*, 523 So.2d 158 (Fla.1988); *Harmon v. State*, 527 So.2d 182 (Fla.1988); *Spivey v. State*, 529 So.2d 1088 (Fla.1988); *Pentecost v. State*, 545 So.2d 861 (Fla.1989); *Fuente v. State*, 549 So.2d 652 (Fla.1989).

The fact that the trial court found four valid aggravating circumstances and no mitigating circumstances neither answers the question of whether there was a reasonable basis for the jury life recommendation nor supports the affirmance of a death sentence under Florida Supreme Court precedent. In other cases, a judge found four or more valid aggravating circumstances and no mitigating circumstances, but the Florida Supreme Court reversed for a life sentence because its examination of the record disclosed mitigating circumstances that could serve as a reasonable basis for the life recommendation.

Hawkins, id.; Richardson, id.; Neary, id.; Welty, id. In still other cases, the Florida Supreme Court reversed overrides because a review of the record indicated a reasonable basis for the life recommendation, even though the judge found valid aggravating circumstances and no mitigating circumstances. *Harvey v. State*, 439 So.2d 1372 (Fla.1983); *McCampbell, id.; Gilvin, id.; Barfield, id.; Williams, id.; Provence, id.; Taylor, id.*

If we were to speculate that the Florida Supreme Court did apply the narrowing *Malloy/Richardson* construction of the *Tedder* standard in Mr. Parker's case, the application of that standard to the facts of record cannot be justified, even under the *Lewis v. Jeffers* "rational fact finder" test. The question to be answered, under *Tedder*, is, "Could any rational factfinder find no reasonable basis for the jury's recommendation?" In addition to introducing evidence tending to show the presence of statutory mitigating circumstances, the Defendant presented and argued uncontradicted evidence of non-statutory mitigation. The Eleventh Circuit noted "the fact that the trial judge listened to copious evidence of non-statutory mitigating circumstances presented by Parker during the sentencing phase. . . . " *Parker v. Dugger*, 876 F.2d at 1475, n.7. The District Court noted that the presence of non-statutory mitigating circumstances was fairly supported by the record, and that these same mitigating circumstances had been held to form a reasonable basis for jury life recommendations in other cases. (J.A.141-2). Thus we have a situation where all the federal courts that have examined the record have unequivocally found evidence which would support a jury's life recommendation based on mitigating circumstances, but the Florida Supreme Court affirmed the death sentence on the stated ground that "[t]he trial court found no mitigating circumstances

to balance against the aggravating factors." 458 So.2d at 754. The fact that federal courts, in examining the record, found mitigating circumstances demonstrates compellingly that the Florida Supreme Court performed no examination of the record. If the Florida Supreme Court had examined the record, it would have found what the federal courts found and would have been compelled to vacate the death sentence, based upon its standard "narrowing" construction of *Tedder*:

> As we reiterated in the recent case of *Ferry v. State*, 507 So.2d 1373 (Fla.1987), only when there are no "valid mitigating factors discernible from the record upon which the jury could have based its recommendation" is an override warranted. *Id.* at 1376. *Fead v. State*, 512 So.2d 176, 178 (Fla.1987).

"When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation." *Holsworth v. State*, 522 So.2d 348, 354 (Fla.1988). Because valid mitigating factors are so readily apparent, no rational fact finder could have applied the *Malloy/Richardson* construction of *Tedder* and sustained the death sentence here.

Subsequent decisions of the Florida Supreme Court give indications as to why Robert Parker's appeal was decided in such an aberrational manner. It appears that in 1984 and 1985, in the wake of *Spaziano*, the Florida Supreme Court affirmed a much higher percentage of overrides than it has before or since. The Florida Supreme Court recently commented on this phenomenon in *Cochran v. State*, 547 So.2d 928 (Fla.1989), at 933:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been

> applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So.2d 833, 851 (Fla.1988) (Shaw, J., specially concurring):
>
> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, 73%. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than 20%. This current reversal rate of over 80% is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .
>
> Clearly since 1985 the Court has determined that *Tedder* means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d at 910.

Thus, the Florida Supreme Court itself has recognized that *Tedder* did not "mean what it says" in 1984, when Mr. Parker's appeal was decided.

One factor in the aberrant application of the *Tedder* standard is the Florida Supreme Court's misconstruction of *Lockett v. Ohio*, 438 U.S. 586 (1978), during the period when Mr. Parker's case was on appeal. After *Lockett* but before *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Florida Supreme Court held that although nonstatutory mitigating evidence had to be admitted, it did not have to be considered by either the trial judge or jury. As the Florida Supreme Court noted in *Downs v. Dugger*, 514 So.2d 1069 (Fla.1987), at 1071:

> *Hitchcock* rejected a prior line of cases issued by this court, which had held that the mere opportunity to present non-statutory mitigating evidence was sufficient to meet *Lockett* requirements. Under this "mere presentation" standard, we routinely declined to consider whether the judge or jury actually weighed the evidence in question.

At the time of Robert Parker's appeal, then, the Florida Supreme Court not only applied the *Tedder* standard in an inconsistent fashion, it failed to consider whether the trial court judge gave any weight to non-statutory mitigating circumstances.

The Florida Supreme Court recently acted to correct this deficiency in *Campbell v. State*, ___ So.2d ___, 15 F.L.W. S.342 (Fla.1990). It is now required that a trial judge expressly evaluate by written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory mitigating circumstances, it is truly of a mitigating nature. *Id.*, at S.344. Valid nonstatutory mitigating circumstances include an abused or deprived childhood, contributions to society through an exemplary work, military, family or other record, charitable or humanitarian deeds, and disparate treatment of an equally culpable co-defendant. *Id.*, at n.6. These nonstatutory mitigating circumstances were all present in Robert Parker's case, yet none were mentioned by the trial judge or the Florida Supreme Court. Most recently, the Florida Supreme Court held that: " . . . when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find the mitigating circumstance has been proved." *Nibert v. State*, ___ So.2d ___, 15 F.L.W. S415, 416 (Fla.1990). In light of *Campbell* and *Nibert*, it appears that

the disregard of mitigating circumstances which characterized the sentencing opinions of the trial judge and the Florida Supreme Court in Mr. Parker's case cannot recur in the future.

An additional aspect of this case demonstrates that the Florida Supreme Court failed to look beyond the trial court's sentencing order and failed to consider non-statutory mitigating circumstances. The trial judge found six aggravating circumstances and no mitigating circumstances as to the Sheppard homicide (J.A.54-60). The Florida Supreme Court held that two of the aggravating circumstances were not supported by the evidence. *Parker*, 458 So.2d at 754. When a trial judge has improperly found one or more aggravating circumstances, the case will ordinarily be remanded for resentencing under the *Elledge* rule described above, unless the trial judge found no mitigating circumstances. *Elledge v. State*, 346 So.2d 998, 1002-3 (Fla.1977). For this purpose, the Florida Supreme Court prior to *Hitchcock v. Dugger*, considered only statutory, not non-statutory, mitigating circumstances. *Elledge, id.* See also, *Barclay v. Florida*, 463 U.S. at 966, n.12. The latter restriction helps to explain why Mr. Parker's evidence of non-statutory mitigating circumstances was ignored on appeal, but the explanation is constitutionally infirm. The trouble with it – and with the pre-*Hitchcock Elledge* rule – is that they run contrary to this Court's decisions in *Lockett*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Hitchcock*:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . . the sentencer and the court of criminal appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such

evidence from their consideration. *Eddings v. Oklahoma*, 455 U.S. at 113-5.

This in turn points up a related reason for reversal. In *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990), this Court held that, where a death sentence is based in part on an invalid or improper aggravating circumstance, a state appellate court may uphold the death sentence either by re-weighing the aggravating and mitigating evidence or by harmless error review. However, where the State's death penalty scheme requires the weighing of aggravation versus mitigation, the Eighth Amendment prohibits the automatic affirmance of a death sentence simply because there are one or more remaining valid aggravating circumstances. *Clemons, id.*, at 1450. Though Florida is a weighing state, and though the Florida Supreme Court on Mr. Parker's appeal held that two aggravating circumstances had been improperly found, that court made no mention of applying a harmless error analysis in upholding Parker's death sentence. Neither did the court state that it was re-weighing the aggravating and mitigating circumstances. A literal reading of its abbreviated opinion on this point suggests an automatic affirmance of the death sentence simply by virtue of the fact that valid aggravating circumstances existed. This, of course, is constitutionally impermissible under *Clemons*.

In summary, the Florida Supreme Court affirmed Robert Parker's death sentence, in disregard of the usual *Tedder* standard by failing to utilize the *Malloy/Richardson* "reasonable basis" test. This error may have been compounded by the application of the *Elledge* rule, which gives no consideration to non-statutory mitigating circumstances. The end result is that the Florida Supreme Court arbitrarily ignored the "copious evidence" of non-statutory mitigation that was undoubtedly the basis for

the jury's life recommendation. Mr. Parker's death sentence must be vacated unless and until the Florida Supreme Court reconsiders it, using constitutionally permissible standards of review. At the very least, *Clemons v. Mississippi* requires that the Florida Supreme Court conduct either a constitutionally permissible re-weighing of the evidence or a constitutionally permissible harmless error analysis.

ARGUMENT II

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S CONSTITUTIONAL CLAIM AGAINST AN EVIDENTIALLY UNSUPPORTABLE FELONY MURDER CONVICTION WAS NOT PRESENTED TO AND DECIDED BY THE FLORIDA SUPREME COURT ON DIRECT APPEAL AND THAT, EVEN IF THE CLAIM WAS PROPERLY PRESERVED ON APPEAL, IT WAS PROCEDURALLY BARRED BY PETITIONER'S FAILURE TO RE-RAISE IT IN STATE POST CONVICTION PROCEEDINGS.

During voir dire, the jury was extensively questioned about the law of felony murder (T.449-50, 582, 667-9, 779-80, 851-2). At the charge conference, the State requested that the jury be instructed on first degree felony murder as to both Count One and Count Two, arguing that the applicable felony in Count One was kidnapping and, in Count Two, robbery (J.A.3-5). The Defendant objected to the felony murder instruction on the grounds that it was not supported by the evidence, but his objection was overruled (J.A.4-5).

In summation, the prosecutors emphasized that Sheppard's ring and necklace had been removed from her body (T.2130); they noted that the jury would be instructed on both premeditated and felony murder (T.2143); they commented that Billy Long was not guilty

of felony murder (T.2147); they argued that Robert Parker was guilty of first degree murder even by his own testimony (T.2148-9, 2153); they discussed felony murder as it related to the Padgett homicide (T.2263-4); and, finally, they argued that Parker was guilty of first degree felony murder in the Sheppard homicide (T.2274-5). The jury returned a general verdict of guilty of first degree murder (J.A.31).

When the trial judge overruled the jury's life recommendation on to Count Two, he found the existence of an aggravating circumstance under Section 921.141(5)(d), Florida Statutes (1981): that the capital felony was committed during the course of a robbery (J.A.57). On direct appeal, the Florida Supreme Court rejected the finding that the murder was committed during a robbery because " . . . the evidence does not satisfy the standard of proof beyond a reasonable doubt." *Parker*, 458 So.2d at 754. However, it affirmed the conviction, saying that "[i]n addition to considering all other issues raised on appeal, *we have conducted an independent review of the record on trial and found no reason to award a new trial.*" *Id.* As the U.S. District Court later noted, the issue of the erroneous felony murder instruction was "clearly raised" at trial and "the Florida Supreme Court could not have overlooked" the issue (J.A.102-3). Upon receipt of the Florida Supreme Court's opinion, Parker filed a motion for rehearing, pointing out that the felony murder instruction could have caused the jury to convict him on a theory of guilt that was unsupported by the evidence (J.A.81-3). The Florida Supreme Court denied rehearing without opinion (J.A.87).

In *Stromberg v. California*, 283 U.S. 359 (1931), the defendant was convicted under a statute which contained

three clauses, one of which was constitutionally invalid. Even though his conviction could have rested solely on one of the valid clauses, this Court reversed the conviction because:

> The verdict against the appellant was a general one, it did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined on this record that the appellant was not convicted under that clause. *Id.*, at 367-8.

This Court has more recently restated the principle as follows:

> One rule derived from the *Stromberg* case requires that the general verdict be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. *Zant v. Stephens*, 462 U.S. 862, 882 (1983).

It is now settled, as well, that Fourteenth Amendment due process prohibits a conviction except upon proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). The Florida Supreme Court has ruled that the evidence as to felony murder in Count Two did not meet the reasonable doubt standard. *Parker*, 458 So.2d at 754. A conviction under this felony murder theory would therefore be unconstitutional under *Jackson*. Applying *Stromberg*, there are two independent grounds for the first degree murder verdict, and the felony murder ground is

constitutionally invalid. Because the verdict was a general one and it cannot be determined that the Defendant was not convicted under the constitutionally invalid felony murder theory, Robert Parker should be entitled to a new trial on Count Two.

The Court of Appeals declined to reach the merits of this issue, however, finding procedural default:

> The record reflects that Parker did not raise a *Stromberg* claim before the original trial court or on direct appeal to the Florida Supreme Court. He also did not raise the claim in his Rule 3.850 motion to the trial court or in his appeal to the Florida Supreme Court of the denial of that motion. *Parker v. Dugger*, 876 F.2d at 147.

The court found, alternatively, that, even if the *Stromberg* claim was raised in the Defendant's petition for rehearing on direct appeal, the issue was procedurally barred because it had not been raised again in his subsequent Rule 3.850 motion and collateral appeal. *Id.*, n.10. These holdings stem from an implausible view of the record and an apparent misconstruction of this Court's language referring to the "last state court rendering a judgment in this case" in *Harris v. Reed*, 109 S.Ct.1038 (1989).

Contrary to the panel opinion, the best and most reasonable interpretation is that the Florida Supreme Court did consider the merits of this issue, bringing the case within the rule of *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). *First*, Parker objected to the felony murder instruction at trial on the grounds that the evidence was insufficient to support it. *Second*, the sufficiency of the evidence to support felony murder was presented to the Florida Supreme Court, albeit concerning an aggravating circumstance; and the Florida

Supreme Court found that the evidence was indeed insufficient. *Third*, the Florida Supreme Court conducted an independent review of the entire record to determine if there was any basis for a new trial, and found none. *Parker*, 458 So.2d at 754. *Fourth*, as the District Court noted, the issue was so readily apparent that the Florida Supreme Court "could not have overlooked it" during this review (J.A.103). *Fifth*, in capital cases, this kind of independent review by the Florida Supreme Court reaches issues not raised by the appellant. See, *e.g.*, *Elledge v. State*, 346 So.2d 998, 1002 (Fla.1977) ("admittedly the testimony . . . was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by his court in death cases"). *Sixth*, the fact that the Defendant may have been convicted on a theory of felony murder when the evidence of felony murder was insufficient was pointed out to the Florida Supreme Court in the Defendant's motion for rehearing. *Seventh*, the State's response to the motion for rehearing was not that the argument came too late, but that the motion was a re-argument of issues already decided (J.A.84-6). *Finally*, the rehearing motion was denied by the Florida Supreme Court without opinion. As in *Ulster County v. Allen*, there is simply nothing in this history to warrant an inference that the state court declined to decide the merits of Mr. Parker's claim. 442 U.S. at 150.

The Eleventh Circuit held, as an alternative ground, that even if the *Stromberg* issue was raised in Parker's motion for rehearing, it was procedurally barred because it was not raised in the "last state court rendering a judgment in the case." *Parker v. Dugger*, 876 F.2d at 1477, n.10. The "last state court rendering a judgment in the

case" was thought to be the Florida Supreme Court in its decision on the Defendant's appeal from state collateral proceedings. See, *Parker v. State*, 491 So.2d 532 (Fla.1986). Apparently, the panel interpreted this Court's language in *Harris* to require that a habeas corpus petitioner raise all constitutional issues in both direct appeal and state collateral proceedings in order to preserve the issues for federal review. Such an interpretation of *Harris* is an extreme departure from previous decisions of this Court which have specifically disapproved any requirement for "repetitious applications to state courts." *Roberts v. LaVallee*, 389 U.S. 40, 42-44 (1967). See also, *Hathorn v. Lovorn*, 457 U.S.255, 262 (1982), and *Reece v. Georgia*, 350 U.S. 85, 87 (1955). The sufficiency of the evidence to support felony murder was not raised in state collateral proceedings because it had been previously raised and decided on direct appeal. This Court should reach the merits of the issue and overturn Mr. Parker's conviction on Count Two.

ARGUMENT III

WHERE THE JURY WAS PERMITTED TO CONVICT PETITIONER OF FIRST DEGREE MURDER ON EITHER A FELONY MURDER THEORY OR A PREMEDITATED MURDER THEORY, THE COURT OF APPEALS ERRED IN HOLDING THAT THE AVAILABILITY OF THE LATTER THEORY MADE IT HARMLESS ERROR TO INSTRUCT THE JURY TO COMPLETELY DISREGARD PETITIONER'S DEFENSE TO FELONY MURDER.

At the charge conference at trial, the defense requested a general duress instruction (J.A.12-14). The State objected, and requested its own instruction which stated that duress is not a defense to homicide (J.A.16).

The defense objected to the State's requested instruction as being overbroad and proposed that the instruction be modified to indicate that duress can be a defense to felony murder (J.A.17-18). The trial court judge offered to give no instruction on the issue, but the State objected (J.A.19). The trial court judge then agreed to give the State's requested instruction without the defense's requested modification, and did so (J.A.22-5). As a result of the giving is this instruction, the State argued vigorously that the Defendant was guilty of first degree murder even if the jury believed his testimony, because duress was not a defense to murder (T.2147-9, 2153).

In addressing this issue, the Eleventh Circuit assumed that duress is a defense to felony murder under Florida law[1] and that a state trial judge violates the defendant's right to due process by incorrectly instructing the jury on his defense.[2] As this Court has said, "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The due process clause guarantees a defendant in a criminal case a meaningful opportunity to

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[1] While there is no clear holding to this effect, two Florida appellate courts have indicated that duress may be a defense to felony murder, see *Wright v. State*, 402 So.2d 493, 498-9, n.8 (Fla.3d DCA 1981); *Chestnut v. State*, 505 So.2d 1352, 1354 (Fla.1st DCA 1987), and the Florida Supreme Court assumed, without deciding, that duress is a defense to felony murder in *Goodwin v. State*, 405 So.2d 170, 172 (Fla.1981), and *Hawkins v. State*, 436 So.2d 44, 46 (Fla.1983).

[2] See, *U.S. ex rel Reed v. Lane*, 759 F.2d 618 (7th Cir.1985); *U.S. ex rel Means v. Solem*, 646 F.2d 322 (8th Cir.1980).

present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984).

The Eleventh Circuit ruled that the Defendant's requested instruction on duress was misleading because it implied that duress could be a defense to either felony murder *or* intentional murder. *Parker v. Dugger*, at 1479. Because the defense instruction was overbroad, the court found that there was no violation of due process in the trial court's refusal to give it. *Id.* The court either overlooked or ignored the more serious problem. If the Defendant's requested instruction was overbroad because it implied that duress could be a defense to both felony murder and premeditated murder, the State's requested instruction was equally overbroad because it implied that duress could be a defense to neither felony murder nor premeditated murder. The Eleventh Circuit failed to even note that the State's equally misleading instruction was actually given the jury at trial. By the Eleventh Circuit's own reasoning, if the Defendant's requested instruction was erroneous, the instruction given was equally erroneous. The panel also overlooked or ignored the fact that the defense had requested a legally correct modifying instruction that duress could be a defense to felony murder. The appellate court failed to note the fact that Parker had proposed a legally correct instruction, and that the trial court gave a legally incorrect instruction totally obliterating his defense.

During the trial, Robert Parker testified that he became afraid of Tommy Groover when Groover murdered Richard Padgett (T.1846, 1851, 1861, 1863, 1872, 1878-9, 1880-1, 1924, 1945, 1979). He testified that Groover threatened him, his wife, and his family with violent retribution (T.1847-8, 1849, 1865, 1942). He stated that he

believed that, when Billy Long got into Elaine's car, Long knew of Groover's murder plan (T.1868). Parker had seen Long with a gun in the past and was frightened of Long and Groover acting in concert (T.1868, 1880-1, 1962). On cross examination, Parker stated that he was coerced into doing everything he did (T.1979).

Instead of being exculpatory in nature, this evidence had the net effect of being incriminating and compelling a verdict of guilty, when the jury was told that duress was not a defense to homicide. The instruction allowed the prosecutors to argue that the Defendant was guilty based upon his own testimony. If the jury believed that the Defendant was coerced into participating in the "robbery" (*i.e.*, the taking of the necklace and ring), the jury would have had to return a verdict of guilty based upon the court's instructions. It is " . . . constitutionally impermissible for a judge to direct a verdict for the state." *Carella v. California*, 109 S.Ct. 2419, 2422 (1989) (Scalia, J. concurring). The trial court's rulings and instructions here had precisely that effect.

ARGUMENT IV

PETITIONER WAS DENIED DUE PROCESS WHEN THE PROSECUTOR WAS PERMITTED TO CROSS EXAMINE HIM ABOUT THE FACT THAT HE HAD CONFERRED WITH DEFENSE COUNSEL DURING A RECESS IN HIS TESTIMONY, ALTHOUGH THE CONFERENCE HAD BEEN AUTHORIZED BY THE TRIAL JUDGE AND ALTHOUGH THE PROSECUTOR OFFERED NO GOOD FAITH BASIS FOR ASSERTING THAT IT INVOLVED ANY CONDUCT LEGITIMATELY RELEVANT FOR IMPEACHMENT.

Robert Parker took the witness stand and testified in his own behalf. His testimony took about an hour and a

half on direct examination, and he had been on cross examination for an hour and five minutes when the trial court called a recess because the jury's supper had arrived (T.1955-6). The recess was intended to last for approximately forty minutes (T.1956) but was somewhat longer. Prior to the recess, the prosecutors objected to the Defendant being permitted to confer with defense counsel during the recess, and the trial court ordered defense counsel to refrain from doing so until the court was supplied with some law regarding the issue (T.1953-6).

During the recess, counsel supplied the court with a decision of the Florida Supreme Court, *Bova v. State*, 410 So.2d 1343 (Fla.1982), and was then permitted to speak to the Defendant. The trial resumed, as did the Defendant's cross examination. After some unrelated questions, the prosecutor proceeded as follows:

Q: All you have done for the last year is think about this, isn't it?
A: I've thought about it, yes.
Q: You are well coached, aren't you?
A: No sir.
Q: He's been coaching you day in and day out, hasn't he?
A: He's talked to me, he hasn't been coaching me.
Q: He even talked to you today during the recess, didn't he? (Objection overruled)
Q: You even talked to him during the recess a little while ago didn't you?
A: Yes sir I did. (Objection overruled)
Q: You have talked to him hundreds of times, haven't you?
A: Yes sir, several times.
Q: Several, three?
A: No, sir.

Q: More like a hundred?
A: Probably (J.A.26-9).

This Court has recognized that under certain circumstances a defendant in a criminal case has a Sixth Amendment right to consult with counsel during a recess in his trial, even when he is on the witness stand for cross-examination. *Geders v. U.S.*, 425 U.S. 80 (1976); *Perry v. Leeke*, 109 S.Ct. 594 (1989). Here, the trial court judge permitted the Defendant to exercise his right to counsel during the recess. It was a right, however, that was to cost Robert Parker dearly. The Defendant was not only subjected to attack because he exercised his right to consult with counsel, but the State also used the fact of consultation to infer impropriety on the part of his lawyer. Such conduct by the prosecutor served to undermine not only the Defendant's credibility, but that of defense counsel as well. Mr. Parker may well have thought twice about exercising his right to talk to his lawyer had he known that, by doing so, he was subjecting both himself and his attorney to a credibility attack.

This Court has repeatedly held that it is fundamentally unfair, and a violation of due process, for the Government to tell an accused that he may exercise a constitutional right, then penalize him for the use of it. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court held that the use of a defendant's post-arrest silence for impeachment purposes violated the due process clause of the Fourteenth Amendment:

> . . . while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the

> arrested person's silence to be used to impeach an explanation subsequently offered at trial. *Id.*, at 618.

In *Johnson v. U.S.*, 318 U.S. 189 (1943), the trial court mistakenly permitted the defendant to assert his Fifth An endment privilege while on cross examination. The prosecutor asked several questions to which the defendant asserted the privilege, and made much of the assertion in summation. This Court's comments in *Johnson* are applicable to the situation that arose in Robert Parker's trial:

> An accused, having the assurance of the court that his claim of privilege would be granted, might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one . . . elementary fairness requires that an accused should not be misled on that score. *Id.*, at 197.

This Court described the problem succinctly:

> It is whether a procedure will be approved which deprives an accused, on facts such as these, of an intelligent choice between claiming or waiving his privilege. . . . It is the court to whom an accused properly and necessarily looks for protection in such a matter. When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. *Id.*, at 198-9.

An analogous situation arose in *Raley v. Ohio*, 360 U.S. 423 (1959). In *Raley*, the defendants were subpoenaed to appear before a state "Unamerican Activities Commission" and questioned concerning alleged subversive activities. The defendants were informed by the commission that they had a right to rely on the privilege against self incrimination guaranteed by the state constitution. They refused to answer questions on self incrimination

grounds and were then indicted for contempt for failure to answer. The state courts held that a state immunity statute deprived the defendants of the protection of the privilege against self incrimination, and that therefore there was no lawful basis for refusing to answer the questions. This Court vacated the defendants' convictions because " . . . to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the state – convicting a citizen for exercising a privilege which the state had clearly told him was available to him." *Id.*, at 426-7.

In *Geders*, the court noted in dicta that a prosecutor could cross examine a defendant as to the extent of any improper "coaching" during a recess, subject to the control of the court. *Geders, id.*, at 89. This Court had no cause to address the permissible nature of such an examination at that time. However, an interpretation of *Geders* that would permit an attack, such as the one here, on a defendant and his lawyer simply because they acted in conformity with the Constitution would effectively eliminate the right to counsel during a trial recess. It would become a right too costly to assert, because interrogations such as that which occurred in this case would occur routinely. What the prosecutor did here was to first accuse the Defendant of being "well coached," then ask him how many times he consulted with his lawyer, then bring out the fact of consultation during the trial recess as if it confirmed that the Defendant had in fact been improperly coached (J.A.26-9). There is nothing "case specific" about this sort of interrogation. This was a "generic" cross examination in which the Defendant was not even asked whether any coaching had occurred during the recess, nor was he asked what was discussed

during the recess. There was no attempt by the prosecutor to find out what actually had transpired. The accusation of coaching was made, then the fact that the Defendant had met with counsel during the recess was made known, as if to confirm that improper coaching did occur. This was not an attempt by the prosecutor to determine if there was any impropriety during the trial recess. It was, very simply, an attempt to infer impropriety from the mere fact of consultation with defense counsel.

A defendant can respond to such a tactic in only two ways. He can reply that he was not coached, as Mr. Parker did here. Such a denial, however, coming from the very subject of the impeachment, is unlikely to be given much weight by the jury when the prosecutor implies that the mere fact of consultation is evidence of impropriety. The only other means of replying to the coaching allegation would be for defense counsel to take the witness stand and testify as to what occurred between himself and his client during the recess. This, of course, would run afoul of well settled ethical considerations. See, Rule 4-3.7, Rules Regulating The Florida Bar. For counsel to appear as a witness confuses the roles of witness and advocate, and skews the way that a jury views the case. Additionally, for defense counsel to testify would necessarily result in the disclosure of privileged communications and assessments by counsel and by the defendant of how the trial is going and other sensitive subjects, none of which should be made an issue before the jury.

Under appropriate circumstances, of course, this Pandora's Box may have to be opened. But the prosecutor should not be permitted to open it with no justification

whatsoever. Before penalizing or invading attorney-client consultation, a prosecutor should be required to proffer his questions to the defendant outside the presence of the jury or, otherwise demonstrate a good faith basis for a belief that some sort of improper coaching actually occurred. This Court has refused to presume that defense counsel will engage in unethical coaching if defense lawyers are permitted to meet with their clients during a trial recess. *Perry, id.*, at 600. To permit the type of interrogation that was conducted here, would be to jump to precisely that assumption. Unquestionably, that is the very assumption that the prosecutor sought to convey to the jury: that defense counsel must have engaged in unethical coaching if he met with the defendant during a recess in his cross examination.

Requiring a proffer in a brief hearing outside the presence of the jury would not unduly delay a trial. Indeed, Section 90.104(1)(b), Florida Statutes, contemplates an "offer of proof" to the trial judge in order to make the "substance of the evidence" known to the court before an appeal may be had from a ruling excluding evidence. Section 90.104(2) requires that a court conduct such proceeding "to the maximum extent practicable" so as to prevent inadmissible evidence from being presented to the jury. Most states require a good faith basis for impeaching questions and disapprove of cross examination by innuendo. See, for example, *Castillo v. State*, 466 So.2d 7 (Fla.3d DCA 1985); *Commonwealth v. State*, 446 N.E.2d 1041 (Mass.1983). Thus, a requirement that a prosecutor ask questions concerning any alleged "coaching" outside the presence of the jury would be no departure from established practice. Such a procedure would permit the trial judge to determine if there is a valid basis for the allegation, and to determine whether the prejudice of the

questioning itself would outweigh the probative value of the proposed questions and answers.

Here, of course, the prosecutor neither proffered any questions outside the presence of the jury, nor did he proffer any good faith basis that would support his allegations of coaching. The prosecutor simply used the fact that the Defendant had conferred with counsel to insinuate that the Defendant was telling a story invented by his lawyer.

Credibility in this case was all important. The trial was essentially a "swearing contest" between two co-defendant accomplices and the Defendant himself. Under these circumstances, such an attack upon the Defendant's credibility was unquestionably prejudicial, and cannot be considered harmless. The appropriate remedy is reversal for a new trial.

CONCLUSION

If relief is granted on Argument IV above, Mr. Parker should receive a new trial. If relief is granted as to Arguments II or III, Mr. Parker should receive a new trial as to Count II of the Indictment. If relief is granted under Argument I, Mr. Parker's death sentence should be vacated.

Respectfully submitted,

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Florida Statute 921.141 Sentence (1981)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. –

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. – Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United

States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. – After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. – Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported

by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. – The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES. – Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the

unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES. – Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.
